

a **KEPONG INDUSTRIAL PARK SDN BHD & ORS**

v.

TEOH SENG AUN & ORS

b HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2-24-474-1998]
31 MARCH 1999

c **CIVIL PROCEDURE:** *Injunction - Ex parte injunction - Whether failure to make full and frank disclosure fatal - Whether court has discretion - Rules of the High Court 1980, O. 29 r. 1(2A), (2B)*

d The third and fourth plaintiffs had, on 22 April 1997, sold to the defendants all their shares in the Meda Group, which comprised of 34 companies, including the first and second plaintiffs. A dispute arose between the parties, and, in the course of proceedings, the plaintiffs obtained an *ex parte* interim mandatory injunction against the defendants in relation to the return of, *inter alia*, documents belonging to the first and second plaintiff companies.

e The defendants applied to set aside the *ex parte* order on the grounds that the plaintiffs: (i) had failed to make a full and frank disclosure of material facts; and (ii) did not come to court with clean hands. The plaintiffs opposed the application, arguing that the defendants would destroy the documents in question and alleged that the defendants had been dishonest in their dealings with the first and second plaintiffs whilst in control of those companies.

f **Held:**

g [1] A party moving the court for *ex parte* injunctive relief must make a full and frank disclosure of all material facts. With the introduction of O. 29 r. 1(2B) of the Rules of the High Court 1980 ('the RHC'), this requirement is now enshrined and the non-disclosure of material facts is fatal.

h [2] The non-disclosure of material facts is a question of fact to be decided by the court. On the facts, the plaintiffs had failed to make disclosure of very relevant matters and had not come to court with clean hands.

i [3] The previous approach of the courts that there was no absolute right to set aside an *ex parte* order obtained without due disclosure, and that the court had the discretion to decide if such injunction was to be continued or set aside, no longer applied in view of O. 29 r. 1(2B) of the RHC. That approach would only be relevant in *inter partes* applications for interlocutory injunctions.

[Defendants' application allowed with costs.]

Case(s) referred to:

Brink's Mat Ltd v. Elcomber [1988] 1 WLR 1350 (**dist**)
Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 CLJ 93 (**foli**)
Dormeul Freres SA & Anor v. Nicolian International (Textiles) Ltd [1988] 3 All ER 197 (**dist**)
Larut Consolidated Bhd & Anor v. Khoo Ee Bee & Ors [1997] 5 CLJ 307 (**refd**)
Noor Jahan Abdul Wahab v. Md Yusoff Amanshah & Anor [1994] 2 CLJ 249 (**dist**)
Prof Dr A Kahar Bador & Ors v. N Krishnan & Ors [1982] 2 CLJ 370 (**refd**)
South Downs Packers Pty Ltd v. Beaver [1984] SC (Qld) 8 ACLR 990 (**refd**)

Legislation referred to:

Rules of the High Court 1980, O. 29 r. 1(2A), (2B)
For the plaintiffs - Wong Kian Kheong (Andrew Chiew with him); M/s Lee Hishammuddin
For the defendants - Conrad Young; M/s Azman Davidson & Co
Reported by Anne Khoo

JUDGMENT

RK Nathan J:

Facts

The 3rd and 4th plaintiffs together with the three defendants were shareholders and directors of 34 companies (hereinafter referred to as the Meda Group). The Meda Group included the 1st and 2nd plaintiffs.

By 8 in *pari materia* sale and purchase agreements dated 22 April 1997, the 3rd and 4th plaintiffs sold to the three defendants all the shares legally and beneficially owned by them in the Meda Group, including those shares in the 1st and 2nd plaintiffs, for a total consideration of RM200 million, payable by four instalments.

So far as material to this application, it was a term of the said eight sale and purchase agreements that the defendants were to become the legal and beneficial owners of the 3rd and 4th plaintiffs' shares in the Meda Group upon payment of the 2nd instalment.

The 3rd and 4th plaintiffs further entered into a Master Agreement dated 22 April 1997 with the defendants wherein (so far as it is relevant to this application) it was agreed that the 1st and 2nd plaintiffs were given as security for the payment of the 2nd, 3rd and 4th instalments payable by the defendants pursuant to the eight sale and purchase agreements.

- a* It is not disputed that the defendants were unable to pay the 3rd instalment under the sale and purchase agreements on the due date and that the 3rd and 4th plaintiffs enforced their rights under the Master Agreement and were appointed directors of the 1st and 2nd plaintiffs on 2 May 1998.
- b* The plaintiffs now allege that the defendants have failed and/or refused to return, *inter alia*, all files, documents, accounts and vehicles belonging to the 1st and 2nd plaintiffs and have filed this originating summons against the defendants (encl. 1) for conversion and detainment and for delivery-up of all files, documents, accounts and vehicles belonging to the 1st and 2nd plaintiffs and for damages to be assessed on account of the alleged failure and/or refusal to deliver-up the same.
- c*

On 15 June 1998, the plaintiffs obtained an interim mandatory injunction on an *ex parte* basis which has essentially given them the full relief they seek in so far as delivery-up is concerned.

d **The Issue**

- Whilst a holding-over injunction has since been granted *inter partes* pending the disposal of the plaintiffs' *inter partes* application for an interlocutory injunction (which is pending hearing), the application now before the court (encl. 25) is the defendants' application to set aside the *ex parte* order itself.
- e*

Case For The Defendants

The defendants sought to set aside the *ex parte* order on two grounds:

- f* (1) That there was a failure on the part of the plaintiffs to make a full and frank disclosure of material facts.
- (2) The lack of clean hands in approaching the court for *ex parte* relief.

Case For The Plaintiffs

- g* The plaintiffs contended that the defendants would destroy the various documents, files, books, etc., of the 1st and 2nd plaintiffs. The plaintiffs also alleged deceit and dishonesty on the part of the defendants in their dealings with the 1st and 2nd plaintiffs whilst the defendants were in control of those companies.

h **Findings Of The Court**

Ex Parte Applications

- i* It is clear that a party moving the court *ex parte* for injunctive relief must make full and frank disclosure of all material facts. This view is reflected lucidly in the judgment of Mohd Azmi SCJ in *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 MLJ 153 at p. 155 where his Lordship said:

Further, in presenting affidavit evidence to establish the necessary ingredients for an *ex parte* order for a Mareva injunction, it is incumbent on the applicant to make frank and full disclosures of all material facts. Every material representation must not be misleading, and there must not be any suppression of material facts. Failure to do so at the crucial time of making the *ex parte* application would invariably be fatal.

“Material Facts”

What then is “material facts”. In *Professor Dr. A. Kahar Bador & Ors v. N. Krishnan & Ors* [1982] 2 CLJ 370; [1983] 1 MLJ 407 Hashim Yeop A. Sani J (as he then was) said that the suppression of a material fact must be of such a character as to mislead the court or if the true picture was presented the court would probably not have granted the injunction. This was an application to set aside an *ex parte* order. In *Noor Jahan bte Abdul Wahab v. Md Yusoff bin Amanshah & Anor* [1994] 2 CLJ 249; [1994] 1 MLJ 156 Edgar Joseph Jr SCJ sitting as a High Court judge relied on the words of Sir Nicolas Browne-Wilkinson VC in *Dormeuil Freres SA and Anor v. Nicolian International (Textiles) Ltd* [1988] 3 All ER 197 at p. 199 which I quote:

I will deal first with the application to set aside the *ex parte* order. It is a basic principle, applicable, to all *ex parte* applications, that a plaintiff seeking *ex parte* relief must make full disclosure to the court of all facts which are material to the exercise of the court’s discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the court may discharge the *ex parte* injunction on that ground alone. But if, in the circumstances existing when the matter comes before the court *inter partes*, justice requires an order either continuing the *ex parte* injunction or the grant of a fresh injunction, such an order can be made notwithstanding the earlier failure of the plaintiff to make such disclosure. Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an *ex parte* order obtained without due disclosure set aside: **there is a discretion in the court whether to do so or not.** (emphasis added)

In *Noor Jahan* the learned judge held that having considered the matter he was not prepared to hold that if a full and true picture had been disclosed to the court in the first place he would not have granted the interlocutory injunction.

However, it must be noted that *Noor Jahan* was decided prior to the introduction of O. 29 r. 1(2B) of the Rules of the High Court 1980 (the RHC) which now limits the life span of an *ex parte* injunction to two weeks only. Any further injunction will have to be obtained by making a fresh application heard *inter partes*. Prior to the introduction of O. 29 r. 1(2B) of the RHC an *ex parte* injunction continued until trial (or up to such expressed period) if not set aside earlier. Therefore, where upon an application to set aside the

- a* order, if the court found that there was a material non-disclosure justifying a setting aside of the *ex parte* injunction but nevertheless, on looking at all the material then before the court (including the evidence not previously disclosed at the *ex parte* stage) the court found that the justice of the case so required the continuation of the order, the court might order a continuation of the
- b* injunction despite the previous material non-disclosure. In fact, this was the prevalent view and in *Brink's Mat Ltd v. Elcomber* [1988] 1 WLR 1350 the Court of Appeal said that the borderline between material and non-material facts may be a somewhat uncertain one. It went on to hold further that whilst in no way discounting the heavy duty of candour and care which falls on
- c* persons making *ex parte* applications, the application of the principle should not be carried to extreme lengths.

- From these cases and more so from the decision in *Brink's Mat* it can be gathered that the principles applicable to a non-disclosure case is that the court will first decide whether there was material non-disclosure justifying a setting
- d* aside of the *ex parte* order. As said by Ralph Gibson LJ at p. 1356 "the material facts are those which it is material for the judge to know in dealing with the application as made;". Only then does the discretion arise to nonetheless continue the *ex parte* injunction or to set it aside and grant a fresh injunction. The discretion to continue the *ex parte* injunction only arises
- e* because there is a discretion to grant a fresh one. In the circumstances, when the need to exercise this discretion arises it will be governed by whether the non-disclosure was innocent and whether the injunction would have been granted if the non-disclosed facts had indeed been disclosed.

- However, it is my judgment that this discretion does not now arise in the light
- f* of O. 29 r. 1(2B) of the RHC. The effect of this amendment to O. 29 is that the court will look purely as to whether there has been a non-disclosure of material facts in line with the decision in *Creative Furnishing*. The earlier principle that whether in all the facts now before the court including the previously non-disclosed facts the court might be minded to grant the
- g* injunction is no longer of relevance. That to my mind, would become relevant only when it comes to the plaintiffs' *inter partes* application for an interlocutory injunction. This was the approach I adopted in *Larut Consolidated Bhd & Anor v. Khoo Ee Bee & Ors* [1997] 4 MLJ 77. This is what I said at p. 97:

- h* ... Order 29 r. 1(2A) of the RHC 1980 was introduced for a specific purpose and with specific reference to *ex parte* applications. The need for full and frank disclosure at the *ex parte* stage has now been enshrined in the rules. Such rules cannot be treated as mere pedantic verbiage. They must be strictly complied with by the parties and enforced by the court. It is my finding that the plaintiffs
- i* had indeed breached this rule.

There again I relied on *Creative Furnishing* and set aside the *ex parte* order. However, considering all matters, I granted a fresh injunction in the *inter partes* application. To my mind the requirements of full and frank disclosure in *ex parte* applications has now been enshrined in O. 29 r. 1(2A) of the RHC. Learned counsel for the plaintiffs argues that since the duration of any *ex parte* injunction is now limited to only 14 days and that the plaintiffs have to apply within the 14 days from the date of the *ex parte* order for an *inter partes* order, this meant that any possible injustice arising from any *ex parte* injunction obtained by concealment of material facts is now limited to a 14-day period. As such, counsel argued there need not be such a high standard of disclosure. All that was required was for the plaintiffs to disclose all material facts which might influence the court in deciding whether to grant the *ex parte* order or not. The fallacy in this argument is apparent. It allows for the plaintiffs to make selective disclosures and do any mischief they can within the 14 days. This cannot be what is envisaged by a court of equity. It is also to be noted that there is no equivalent to O. 29 r. 1(2B) in England, Australia or Singapore whether as rules or as practice directions. It is therefore important to be careful in relying on authorities from those jurisdictions and the pre O. 29 r. 1(2B) in so far as it concerns the point regarding the further discretion to continue the *ex parte* injunction.

Were There Any Material Non-Disclosures?

In *Brink's Mat* the court held that the material facts are those which is material for the judge to know in dealing with the application as made and that the materiality is to be decided by the court and not based on the assessment of the applicant or his legal advisers. It must also be clearly borne in mind that whether there is a non-disclosure of a material fact or not in a particular case, is a question of fact (see *South Downs Packers Pty Ltd v. Beaver* [1984] SC (Qld) 8 ACLR 990.) In the circumstances, cases on material non-disclosure are not binding precedents of law but are merely illustrative of this general principle that it is incumbent on the plaintiff to disclose material facts.

The Turnkey Contract And The Supplemental Agreement

There is no dispute that at the time the Turnkey Contract was entered into on 15 May 1995 by the 1st plaintiff with one Meda Property Services Sdn Bhd (MPS) the 3rd and 4th plaintiffs, together with the three defendants were all shareholders and directors of both the 1st and 2nd plaintiffs and as such had full knowledge of the same. In their *ex parte* application the plaintiffs alleged deceit and deception on the part of the defendants in entering into the Supplemental Agreement dated 5 January 1998 between the 1st plaintiff and MPS when the defendants were in control of the 1st defendant. It is clear that the Supplemental Agreement essentially records the agreement reached in

- a* respect of variations to the works done by MPS for the 1st plaintiff whereby it was also agreed that in consideration thereof an additional sum of RM61,560,740 was payable to MPS.
- b* By their evidence, the plaintiffs contended that this was not done in the ordinary course of business, thus implying that the defendants were enriching MPS at the expense of the 1st plaintiff which was one of the securities given in the Master Agreement. On this basis the plaintiffs argued in the *ex parte* application that there was every risk that the defendants might destroy documents to cover their tracks.
- c* The plaintiffs failed to disclose the fact that by the terms of the Turnkey Contract, MPS was to implement and carry out the 1st plaintiff's only project which included the obtaining of necessary approvals, procuring bridging and end-financing, co-ordinating sales to end purchases, sales management, administration, billings, collection of payments, etc. In the circumstances, MPS
- d* had every right to be in possession and custody of all operational documents relating to the 1st plaintiff's project in order to carry out their obligations. It is also a material fact that at the time of instituting this action on 3 June 1998 and at the time the *ex parte* summons was filed on 4 June 1998 the 1st plaintiff had not as yet terminated MPS as the turnkey contractor. The termination was on 12 June 1998 although its effectiveness is being challenged.
- e* The defendants had set out the reasons for entering into the Supplemental Agreement. This was due to delays due to late approvals by the authorities, by changes in design and layout, by changes from hostel units to high cost units, by changes to specifications and designs of the terrace factories. Since
- f* these changes had effective cost implications, there was a need to increase the costs and thus the need for a Supplemental Agreement. It is also of significance to note that whilst the plaintiffs lament over the increased costs due to delay, there was already delay when the 3rd and 4th plaintiffs were all part of the Meda Group and they were therefore aware of the delay. The
- g* plaintiffs also objected to the fact that the Supplemental Agreement allowed for extension of time to complete the works. But there is evidence that these extensions were already agreed to by 8 October 1996 well before the 3rd and 4th plaintiffs left the Meda Group. In fact, the same extended completion dates were reduced into cl. 5 of the Supplemental Agreement.
- h* It is clear therefore that whilst the plaintiffs fully knew the reasons behind the Supplemental Agreement yet they presented a picture of piety on their part whilst presenting the defendants as perpetrators of deceit and dishonesty.
- i*

The plaintiffs contend that the Turnkey Contract and Supplemental Agreement are not relevant to their cause of action in the tort of conversion and detainment which is the case before me. They also argue that since the defendants had in their application to strike out the writ also raised as one of their grounds, the right of MPS to possess the documents by virtue of the Supplemental Agreement, and since I had dismissed the defendants' application to strike out on 10 December 1998, the defendants are now estopped from raising this issue.

I do not accept this view. There were numerous issues raised in that earlier application. I merely gave an oral decision. There was no appeal against that decision. Since the non-disclosure by the plaintiffs of the terms and conditions of the Turnkey Contract and Supplemental Agreement struck at the very root of the 1st plaintiff's case in that it directly related to the question as to whether the 1st plaintiff had an immediate right to possession to the turnkey documents, I hold that the defendants are at liberty to raise the right of MPS to the documents as a specific issue in respect of this application.

In the light of my explicit finding that the plaintiffs had failed to make disclosure of very relevant matters in respect of the two agreements, I do not see the need for me to go into all other matters relating to non-disclosure.

The Lack Of Clean Hands

In the light of my earlier finding it follows that the defendants must also succeed under this head.

It has been shown that the 4th plaintiff has himself authorised a RM110,275 discount to a company where his relatives have interests on account of a purchase of property of the 1st plaintiff. This has not been denied by the plaintiffs.

Having read all the authorities of both parties I order that:

- (a) the *ex parte* order of this court dated 15 June 1998 be set aside;
- (b) the plaintiffs do pay the defendants all damages howsoever suffered by the defendants arising from or as a consequence of the granting of the said order dated 15 June 1998;
- (c) the Deputy Registrar do assess damages; and
- (d) the costs of this application be paid by the plaintiffs to the defendants.

a

b

c

d

e

f

g

h

i